RECORD AND BRIEFS

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No. 15-1359

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

AHMER IQBAL ABBASI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the judicially inferred damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context of this case, which seeks to hold the former Attorney General and Director of the Federal Bureau of Investigation (FBI) personally liable for policy decisions made about national security and immigration in the aftermath of the September 11, 2001 terrorist attacks.

2. Whether the former Attorney General and FBI Director are entitled to qualified immunity for their alleged role in the treatment of respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism.

3. Whether respondents' allegations that the former Attorney General and FBI Director personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), in light of the obvious alternative explanation—identified by the Court in *Iqbal*—that their actions were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to be released.

PARTIES TO THE PROCEEDING

Petitioners John D. Ashcroft (former Attorney General of the United States) and Robert Mueller (former Director of the Federal Bureau of Investigation) were defendants in the district court and cross-appellees in the court of appeals.

The other parties to the proceeding include:

Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya, on behalf of a putative class, who were plaintiffs in the district court and appellees-cross-appellants in the court of appeals;

Ibrahim Turkmen and Akhil Sachdeva, who were also plaintiffs in the district court and appellees-cross-appellants in the court of appeals but have not entered an appearance in this Court;

Dennis Hasty (former Warden of the Metropolitan Detention Center), Michael Zenk (former Warden of the Metropolitan Detention Center), and James Sherman (former Metropolitan Detention Center Associate Warden for Custody), who were defendants in the district court and appellants-cross-appellees in the court of appeals; Hasty and Sherman are the petitioners in No. 15-1363; and

James W. Ziglar (former Commissioner of the Immigration and Naturalization Service), who was a defendant in the district court and a cross-appellee in the court of appeals, and is the petitioner in No. 15-1358.*

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* Two other individuals (Salvatore Lopresti and Joseph Cuciti) were defendants in the district court but were not parties in the court of appeals. See Pet. App. 3a n.2.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-163a) is reported at 789 F.3d 218. The opinions of members of the court of appeals concurring in and dissenting from the denial of rehearing en banc (Pet. App. 237a-250a) are reported at 808 F.3d 197. The opinion of the district court (Pet. App. 164a-236a) is reported at 915 F. Supp. 2d 314.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2015. Petitions for rehearing were denied on December 11, 2015 (Pet. App. 237a-238a). On February 29, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 11, 2016. On April 1, 2016, Justice Ginsburg further extended the time to May 9, 2016,

and the petition was filed on that date. The petition for a writ of certiorari was granted on October 11, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Like *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), this case involves civil claims against high-ranking federal officials brought by aliens who were arrested after the September 11, 2001 terrorist attacks and detained at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Petitioners are the former Attorney General of the United States and the former Director of the Federal Bureau of Investigation (FBI). As relevant here, six respondents claim, on behalf of themselves and a putative class, that the highly restrictive conditions of their detention at the MDC violated their substantive-due-process and equal-protection rights under the Fifth Amendment. Pet. App. 301a-332a, 342a-343a (Fourth Am. Compl. (Compl.) ¶¶ 141-244, 276-283).[1] Respondents contend that petitioners, along with other Department of Justice officials, are personally liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and liable as co-conspirators under 42 U.S.C. 1985(3). See Pet. App. 255a-256a (Compl. ¶ 9). Re-

[1] The court of appeals affirmed the dismissal of claims brought by Ibrahim Turkmen and Akhil Sachdeva (who were detained elsewhere), Pet. App. 75a, 84a, 86a, and those two individuals did not appear in this Court at the certiorari stage, see Br. in Opp. 36 n.15. This brief therefore uses "respondents" to refer to the six plaintiffs who were detained at the MDC, to the exclusion of the others identified in the Parties to the Proceeding section (see p. II, *supra*). The caption of the case has been altered to identify one of the MDC detainees, rather than Turkmen, as the lead respondent.

spondents seek compensatory and punitive damages, as well as attorney's fees and costs, from those officials in their individual capacities. *Id.* at 348a (prayer for relief).

As the Court discussed in *Iqbal*, the Department of Justice conducted a massive investigation to identify the perpetrators of the September 11 attacks and to prevent any follow-on attacks. 556 U.S. at 667. "The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor" and, in the first week, "'received more than 96,000 tips or potential leads from the public.'" *Ibid.* (quoting Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 12 (Apr. 2003) (*OIG Report*)).[2]

Because the perpetrators of the September 11 attacks were all foreign nationals, the Department's investigation "had a significant immigration law component." *OIG Report* 12 (J.A. 60). FBI agents were instructed that "if, during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the * * * attacks." *Id.* at 13 (J.A. 61). Immigration and Naturalization Service (INS) agents, who worked in tandem with the FBI, were instructed to "exercise sound judgment" and to limit arrests to those aliens in whom the FBI had "an interest." *Id.* at 44 (J.A. 108). In the first two months of the investigation, "the FBI ques-

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[2] The *OIG Report*, with the original pagination cited in *Iqbal* and the decisions below, is available at https://oig.justice.gov/special/0306/full.pdf. Most of the report is also reprinted at J.A. 34-335.

tioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general." *Iqbal*, 556 U.S. at 667. Federal officials eventually arrested and detained 762 aliens on immigration charges. *Ibid.*

Aliens arrested for immigration violations who were not deemed of interest to the September 11 investigation were processed according to normal INS procedures. *OIG Report* 40 (J.A. 102). By contrast, aliens deemed of interest to the investigation were subjected to an unwritten "hold until cleared" policy, under which they were held without bail until they had been cleared of any connections to terrorism. *Id.* at 37-40 (J.A. 97-101).

The hold-until-cleared policy did not specify where September 11 detainees should be detained during their clearance investigations. The responsibility to make that determination "fell largely to the arresting * * * agent." Pet. App. 67a (citing *OIG Report* 17-18, 126-127, 158 (J.A. 68-69, 240-242, 292)). Detainees on the INS's nationwide custody list were placed in a variety of federal, local, and private facilities across the United States. *OIG Report* 2 (J.A. 44-45). A total of 84 detainees were housed at the MDC for varying periods between September 14, 2001, and August 27, 2002. *Id.* at 111 (J.A. 219). Those detainees were placed in the MDC's Administrative Maximum Special Housing Unit (ADMAX SHU), ensuring that they were subjected to the most restrictive conditions of confinement authorized by Bureau of Prisons policy. *Id.* at 111-112 (J.A. 219-220); *Iqbal*, 556 U.S. at 667-668.

Not every alien was subjected to the hold-until-cleared policy in the same manner. Acting independ-

ently and without the knowledge of FBI and INS headquarters, see *OIG Report* 54 (J.A. 124), the FBI and INS field offices in New York decided that all aliens they arrested in connection with a lead related to the September 11 investigation would be held until cleared without any additional determination that there was evidence tying those aliens to terrorism. *Id.* at 53-54 (J.A. 123-124); Pet. App. 37a-38a.[3] Some of the aliens on the resulting "New York List" of detainees were confined in the ADMAX SHU at the MDC, but the vast majority were detained under less-restrictive conditions with the general population at the Passaic County Jail in New Jersey. Pet. App. 130a, 152a-153a.

INS headquarters learned of the New York List in October 2001. *OIG Report* 53-54 (J.A. 122-124). That discovery triggered two Justice Department meetings to discuss whether the detainees on the New York List should continue to be held without bail. *Id.* at 55-56 (J.A. 125-128). Neither the Attorney General nor the FBI Director was present at those meetings. *Ibid.* At their conclusion, Associate Deputy Attorney General Stuart Levey decided that the detainees on the New York List should be added to the nationwide INS custody list, thus ensuring that the hold-until-cleared policy would continue to be applied to them. *Ibid.* He explained during the Inspector General's later investigation that "he wanted to err on the side of caution so that a terrorist would not be released by mistake." *Id.* at 56 (J.A. 128).

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[3] The Inspector General attributed that decision to the "long history" that "federal law enforcement organizations in New York City" have of "taking actions independent of direction from their Washington, D.C., headquarters." *OIG Report* 54 (J.A. 124).

2. Respondents were detained in the ADMAX SHU at the MDC for periods ranging from three to eight months. Pet. App. 2a, 253a-254a (Compl. ¶ 4). In light of respondents' immigration status, it was undisputedly lawful to arrest and detain them pending their removal from the United States. *Id.* at 2a & n.1; see *Iqbal*, 556 U.S. at 682; *Turkmen* v. *Ashcroft*, 589 F.3d 542, 549-550 (2d Cir. 2009). But respondents argue that the restrictive conditions of their confinement violated their substantive-due-process rights because the government allegedly lacked any individualized information indicating that they were dangerous or involved in terrorism. Pet. App. 253a-254a (Compl. ¶ 4), 265a-267a (¶¶ 39-44). Respondents further contend that the conditions violated their equal-protection rights because they were allegedly singled out for such treatment on account of being (or being perceived as) Muslim and either Arab or South Asian. *Id.* at 255a (¶ 6), 342a-343a (¶¶ 276-283).

Respondents' substantive-due-process and equal-protection claims are brought against two groups of defendants: (1) the "DOJ Defendants" (former Attorney General Ashcroft, former FBI Director Mueller, and former INS Commissioner James Ziglar), and (2) the "MDC Defendants" (for present purposes, a former warden and former associate warden of the MDC). Pet. App. 3a n.2, 258a-261a (Compl. ¶¶ 21-28), 342a-343a (¶¶ 276-283). The equal-protection portion of those claims is echoed in a separate claim that the DOJ Defendants and the MDC Defendants conspired with each other to deprive respondents of the equal

protection of the laws, in violation of 42 U.S.C. 1985(3). Pet. App. 347a (¶¶ 303-306).[4]

3. The DOJ and MDC Defendants moved to dismiss the complaint for three principal reasons: (1) that the judicially inferred remedy under *Bivens* should not extend to some of the claims; (2) that defendants are entitled to qualified immunity; and (3) that plaintiffs failed to state a claim. Pet. App. 5a. The district court granted defendants' motions in part and denied them in part. *Id.* at 164a-236a. The court dismissed the claims against the DOJ Defendants (Ashcroft, Mueller, and Ziglar) in their entirety, finding that respondents had not adequately alleged that those defendants were personally involved in—or even aware of—the creation of conditions of confinement so restrictive as to constitute a substantive-due-process violation. *Id.* at 196a-199a. The court also held that respondents' equal-protection claim fails in light of *Iqbal* because their allegations "do not plausibly suggest that the DOJ Defendants purposefully directed the detention of [respondents] in harsh conditions of confinement due to their race, religion or national origin." *Id.* at 209a. The court rejected respondents' suggestion that a punitive intent could be inferred "from the DOJ defendants' failure to specify that the harsh confinement policy should be carried out *lawfully*." *Id.* at 198a.

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[4] In claims not at issue here, respondents also allege First and Fifth Amendment violations (based on restrictions on their communications with family or counsel or on their ability to practice and observe their religion), as well as Fourth and Fifth Amendment violations (based on allegations that they were subjected to excessive, unreasonable, and deliberately humiliating strip searches). Pet. App. 343a-347a (Compl. ¶¶ 284-302).

The district court denied the motion to dismiss with respect to several of the claims against the MDC Defendants, finding sufficient allegations of their personal involvement in restrictive conditions or abusive conduct, and finding that those defendants are not entitled to qualified immunity. Pet. App. 199a-203a, 209a-211a. The court rejected the argument (made by both the DOJ and MDC Defendants) that it should decline to extend the *Bivens* remedy to the substantive-due-process claim, stating that "conditions-of-confinement claims do not present a new context" for the application of *Bivens*. *Id.* at 193a n.10.

4. The MDC Defendants appealed, and respondents cross-appealed the dismissal of the claims against the DOJ Defendants. Pet. App. 19a-20a. The panel majority ruled for respondents on most issues. *Id.* at 1a-86a. The following discussion focuses on the panel's resolution of the claims against the DOJ Defendants (including petitioners Ashcroft and Mueller).

a. The court of appeals first held that "a *Bivens* remedy is available for [respondents'] punitive conditions of confinement * * * claims against both the DOJ and the MDC Defendants." Pet. App. 22a. The court acknowledged that "the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Ibid.* (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)). It concluded, however, that the claims in this case do not present a new "context" and therefore do not require any extension of *Bivens*. *Id.* at 24a-29a & n.17. In the court's view, respondents' substantive-due-process and equal-protection claims "stand[] firmly within a familiar *Bivens* context" because (i) courts in some prior cases have entertained

Bivens claims for the same allegedly injured rights, and (ii) other courts, in the context of different constitutional rights, have entertained *Bivens* claims premised on the same "mechanism of injury (punitive conditions without sufficient cause)." *Id.* at 24a-25a. The court therefore held that it did not need to consider "whether special factors counsel hesitation in creating a *Bivens* remedy." *Id.* at 29a n.17 (citation omitted).

b. The court of appeals next held that respondents had adequately alleged a substantive-due-process claim, based on the restrictive conditions of their confinement, against the DOJ Defendants. Pet. App. 30a-49a. In so holding, however, the court declined to rely on respondents' theory that application of the hold-until-cleared policy to aliens detained in the course of the September 11 investigation was unconstitutional from the outset. The court recognized that respondents could be lawfully arrested and detained, and that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on any September 11 detainee for whom the government had "individualized suspicion of terrorism." *Id.* at 31a. The court also acknowledged that, to the extent some individuals on the New York List had initially been confined in the ADMAX SHU without individualized suspicion, the DOJ Defendants "did not create the particular conditions in question" because the "initial arrest and detention mandate" did not "require[] subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism." *Ibid.* The court therefore rejected respondents' constitutional objections both to the original detention order and to the confinement at the ADMAX SHU of detainees on "the national INS

List," for whom the government had "a suspicion that they were connected to terrorist activities." *Id.* at 31a-32a.

The court of appeals nevertheless held that respondents' complaint plausibly sets forth a theory of liability that respondents themselves had not advanced. Pet. App. 32a n.21. The court found it plausible that the DOJ Defendants had violated respondents' substantive-due-process rights by deciding (or approving of the decision) to merge the New York List with the national INS List and to continue to subject all detainees to the hold-until-cleared policy. *Id.* at 32a-33a. The court explained that, as a result of that decision, "some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement," even though there had been no express determination that they were suspected of having any terrorism connections. *Id.* at 39a. The court found that, in the absence of such an individualized determination, "it would be unreasonable * * * to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful." *Id.* at 43a. The court inferred that continued detention in such circumstances was "punitive" and therefore a substantive-due-process violation under *Bell* v. *Wolfish*, 441 U.S. 520 (1979). Pet. App. 44a-48a.

In addressing the DOJ Defendants' qualified-immunity argument, the court of appeals concluded that the constitutional right alleged to have been violated was clearly established because any "condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees,"

and "because a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances." Pet. App. 48a, 49a.

c. The court of appeals also held that respondents had adequately alleged an equal-protection claim against the DOJ Defendants. Pet. App. 61a-68a. Again, the court rejected respondents' theory of liability, relying instead on its own lists-merger theory. The court found it "reasonable to infer that [the DOJ Defendants] possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner." *Id.* at 64a. The court presumed the truth of respondents' assertion that the DOJ Defendants had personally "condoned that discrimination by ordering and complying with the merger of the lists, which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement." *Ibid.*

For qualified-immunity purposes, the court of appeals found it "clearly established at the time of [respondents'] detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. 74a.

d. Finally, the court of appeals held that respondents had "plausibly alleged that the DOJ Defendants' actions with respect to the New York List merger were based on the discriminatory animus required for a Section 1985(3) conspiracy claim." Pet. App. 81a. The court noted respondents' allegation of a "tacit agreement" between the DOJ Defendants and two of the MDC Defendants "to effectuate the harsh conditions of confinement with discriminatory intent." *Ibid.*

Even though it had been unclear in 2001 whether the conspiracy statute applied to federal officials, the court concluded that respondents could not claim qualified immunity because "federal officials could not reasonably have believed that it was legally permissible for them to conspire * * * to deprive a person of equal protection of the laws." *Id.* at 83a (citation omitted).

e. Judge Raggi concurred in the judgment in part and dissented in part. Pet. App. 86a-163a. She observed that the decision made the Second Circuit the first court of appeals "to hold that a *Bivens* action can be maintained against the nation's two highest ranking law enforcement officials * * * for policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001." *Id.* at 86a-87a. She would have affirmed the dismissal of respondents' claims on multiple grounds.

First, Judge Raggi concluded that the *Bivens* remedy should not be extended to the novel context of this case, which involves a challenge to policy decisions that implicate the Executive's immigration and national-security authorities, when Congress had been informed of concerns about treatment of the September 11 detainees and had failed to provide any damages remedy. Pet. App. 90a-118a. Second, she concluded that the DOJ Defendants are entitled to qualified immunity because it was not clearly established in 2001 that their conduct (even under the majority's theory) violated respondents' constitutional rights. *Id.* at 137a-145a, 155a-158a. And third, she concluded that the DOJ Defendants are also entitled to qualified immunity because there are insufficient allegations of their personal involvement in any substantive-due-

process or equal-protection violations. *Id.* at 122a-137a, 148a-155a.[5]

5. The DOJ Defendants and the MDC Defendants sought rehearing en banc. Because the 12 participating judges split evenly, rehearing was denied. Pet. App. 238a. Judges Pooler and Wesley, the authors of the panel majority opinion, filed a short opinion concurring in the denial. *Id.* at 238a-240a. They reaffirmed their belief that respondents had "plausibly" pleaded that "the Attorney General ratified the rogue acts of a number of field agents in carrying out his lawful policy" by "endors[ing] the restrictive detention of a number of men who were Arabs or Muslims or both." *Id.* at 239a. They concluded that, after 13 years, "it is time to move the case forward." *Id.* at 240a.

Six members of the court—Judges Jacobs, Cabranes, Raggi, Hall, Livingston, and Droney—filed a joint dissent from the denial of rehearing en banc. Pet. App. 240a-250a. While expressly incorporating Judge Raggi's prior dissent from the panel's decision, they further explained that the panel's decision did not comport with this Court's precedents in three areas of the law: "(1) the narrow scope of *Bivens* actions, (2) the broad shield of qualified immunity, and (3) the pleading standard for plausible claims." *Id.* at 241a. Although the dissenters "focus[ed]" on the panel's decision "to allow [respondents] to pursue damages against the Attorney General and FBI Director," they also endorsed Judge Raggi's view that the "claims against other officials should also be dismissed." *Id.* at 249a-250a n.16.

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[5] For the same reasons that she would have dismissed the equal-protection claim, Judge Raggi would also have dismissed the Section 1985(3) conspiracy claim. Pet. App. 158a n.46.

SUMMARY OF ARGUMENT

The court of appeals held that the former Attorney General of the United States and the former Director of the FBI may be subjected to discovery, other demands of further litigation, and potential damages liability in their individual capacities for unintended consequences arising from the implementation of policy decisions they made 15 years ago during an unprecedented national-security crisis. That conclusion was erroneous for three independent reasons.

I. The judicially inferred damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should not be "extend[ed] * * * into any new context," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001), without a consideration of whether "any special factors counsel[] hesitation before authorizing a new kind of federal litigation," *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983). The court of appeals failed to heed that admonition, holding instead that a *Bivens* claim may proceed whenever the "rights injured" and the "mechanism of injury" have antecedents in prior *Bivens* suits. Pet. App. 24a-25a. That misconception of the relevant "context" caused the court of appeals to overlook three salient features of respondents' claims. Respondents seek to challenge (1) high-level policy decisions that implicate both (2) national security and (3) immigration. Taken together, those features make the context of this case a novel one for *Bivens* purposes, and they counsel decisively against expanding the *Bivens* remedy in the absence of congressional authorization.

II. The court of appeals also erred in holding that petitioners are not entitled to qualified immunity. Even assuming *arguendo* that respondents have plau-

sibly alleged that petitioners personally condoned or endorsed a decision to merge two lists of September 11 detainees, it was not clearly established at the time of petitioners' actions that continued confinement in restrictive conditions under the hold-until-cleared policy was unjustified and therefore necessarily attributable to punitive or discriminatory intentions. In concluding otherwise, the court of appeals defined the relevant legal question at too high a level of generality, committing a mistake that this Court has often had to correct.

The "dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added). The court of appeals, however, did not address the situation petitioners confronted. Instead, it reasoned only from the general proposition that a particular condition of confinement "not reasonably related to a legitimate governmental objective" is punishment in violation of the constitutional rights of "ordinary civil detainees." Pet. App. 43a, 48a-49a, 65a-66a.

Respondents were not ordinary civil detainees. They had already been arrested pursuant to the September 11 investigation, placed in the MDC, and subjected to the hold-until-cleared policy before it was discovered that, for an unknown portion of the members of the New York List, arresting officers had failed to conduct the same initial vetting that detainees on the national INS list had received. The appropriate question is whether such individuals had a clearly established right to be immediately released from restrictive confinement once it came to light that, in some instances, arresting officers had failed to conduct

the same initial vetting that other September 11 detainees received. Neither the court of appeals nor respondents cite any decision indicating, much less clearly establishing, that in the unprecedented circumstances of this case, continuing to apply the hold-until-cleared policy to respondents was so arbitrary as to constitute an impermissibly punitive or impermissibly discriminatory act.

That error is fatal to the court of appeals' qualified-immunity conclusions with respect to respondents' constitutional and statutory claims. The court further erred in analyzing qualified immunity for respondents' statutory claim, by disregarding acknowledged uncertainty in the Second Circuit at the time of the underlying events about whether 42 U.S.C. 1985(3) even applies to conspiracies among federal officials.

III. Finally, in evaluating the sufficiency of respondents' pleadings, the court of appeals did not faithfully apply this Court's decision in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). In *Iqbal*, the Court refused to credit the plaintiff's assertions that the hold-until-cleared policy—the same policy challenged by respondents—was motivated by an invidious purpose. The Court in *Iqbal* identified "more likely explanations" for that policy, including the "'obvious alternative explanation'" that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 681-682, 683 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007)).

The court of appeals appropriately declined to credit respondents' assertions—functionally identical to those advanced in *Iqbal*—that the hold-until-cleared

policy was unconstitutional from its inception. But the court's own lists-merger theory of liability is equally inconsistent with *Iqbal*. Even aside from its dependence on speculation about petitioners' personal involvement in the lists-merger decision, that theory of liability founders because the most likely explanation for the decision is unconnected to any discriminatory purpose. Here, as in *Iqbal*, the obvious alternative explanation for the decision was a nondiscriminatory and understandable "concern that[,] absent further investigation, 'the FBI could unwittingly permit a dangerous individual to leave the United States.'" Pet. App. 19a (quoting *OIG Report* 53 (J.A. 123)); see *Iqbal*, 556 U.S. at 683.

ARGUMENT

As the six dissenting members of the court of appeals explained, the decision below departed from "controlling Supreme Court precedent" in "three areas of law." Pet. App. 243a. First, the court of appeals erroneously refused even to consider whether the unprecedented context of this case—in which respondents seek to impose damages liability upon the former Attorney General and former FBI Director for actions taken in the early weeks of the massive investigation into the September 11, 2001 terrorist attacks—counseled hesitation before extending the civil remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Second, the court erroneously concluded that the decision to subject respondents to restrictive conditions of confinement was a violation of constitutional rights that were clearly established in 2001 (and did not even attempt to explain how it was a violation of clearly established rights under 42 U.S.C. 1985(3)). Third, in

analyzing the sufficiency of respondents' allegations at the pleading stage, the court erroneously refused to apply the reasoning that this Court applied to materially identical allegations in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Each of those errors independently requires reversal.

I. Special Factors Counsel Against Extending The Judicially Inferred *Bivens* Remedy To This Challenge To High-Level Executive Policymaking At The Confluence Of National Security And Immigration

This Court has "consistently and repeatedly recognized" the need for "caution toward extending *Bivens* remedies into any new context." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). The court of appeals adopted a blinkered approach to evaluating the relevant context and erroneously concluded that this extraordinary case "stands firmly within a familiar *Bivens* context." Pet. App. 25a. It therefore did not address whether "any special factors counsel[] hesitation before authorizing a new kind of federal litigation." *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983). See Pet. App. 29a n.17. Because respondents challenge high-level policy decisions implicating both national security and immigration, the case does implicate special factors that counsel against inferring a damages remedy in the absence of congressional authorization.[6]

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[6] Petitioners Ashcroft and Mueller opposed the extension of *Bivens* in the district court but did not repeat that argument as an alternative ground of affirmance before the court of appeals panel. See Pet. App. 21a. Petitioners did, however, include the issue in their petition for rehearing en banc (at 11-13). In any event, because the question was passed upon by the court of appeals, see Pet. App. 21a-29a, it may be reviewed by this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

A. This Case Does Not Arise In A Familiar *Bivens* Context

1. In its 1971 decision in *Bivens*, the Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Iqbal*, 556 U.S. at 675 (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search and arrest. *Bivens*, 403 U.S. at 389. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

The *Bivens* Court "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has more recently "retreated" because they reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp.*, 534 U.S. at 67 & n.3 (citation omitted). Because such "implied causes of action" are now "disfavored," the Court has been "reluctant to extend *Bivens* liability to any new context or new category of defendants." *Iqbal*, 556 U.S. at 675 (citation and internal quotation marks omitted). For more than 35 years, the Court "ha[s] consistently refused to extend *Bivens* liability." *Correctional Servs. Corp.*, 534 U.S. at 68; see *id.* at 74; *Minneci* v. *Pollard*, 565 U.S. 118, 124-125 (2012); *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007); *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 & n.3 (1988); *United States* v. *Stanley*, 483 U.S. 669, 683 (1987); *Bush*, 462 U.S. at 390; *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983). The

Court has explained that, even when there is no "alternative" process for "protecting the interest" asserted by the plaintiff, courts still must "'pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Wilkie*, 551 U.S. at 550, 554 (quoting *Bush*, 462 U.S. at 378).

2. Embracing the court of appeals' analysis, respondents contend that their *Bivens* claims "arise in a familiar context" because respondents raise "a familiar constitutional claim based on a familiar mechanism of injury." Br. in Opp. 14, 16 (capitalization modified). Respondents' approach is inconsistent with this Court's decisions, and it has not been adopted by any other court of appeals. By defining both the "constitutional claim" and the "mechanism of injury" at an unduly high level of generality, that approach fails to serve the purposes of the "special factors" inquiry.

The decision below illustrates the problem. The court of appeals characterized respondents' claims at a high level of generality: "[F]ederal detainee [p]laintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions." Pet. App. 24a. The court conducted a similarly abstract inquiry in considering whether "the rights injured" and "the mechanism of injury" have any antecedents in prior *Bivens* suits. *Id.* at 24a-25a. In the court's view, the alleged "rights injured" were "substantive due process and equal protection rights," and the alleged "mechanism of injury" was "punitive conditions [of confinement] without sufficient cause." *Ibid.*

The court of appeals compounded its error by concluding that the circumstances presented here arise in a familiar "context" for purposes of *Bivens* liability

because *some* prior decisions had recognized a *Bivens* remedy for substantive-due-process or equal-protection violations, and *other* decisions had recognized such a remedy for unconstitutional conditions of confinement. Pet. App. 24a-25a & n.15, 29a n.17. Thus, the court did not even purport to identify a prior *Bivens* case that shared both attributes of the relevant "context." Rather, the court "mix[ed] and match[ed] a 'right' from one *Bivens* case with a 'mechanism of injury' from another." *Id.* at 95a (Raggi, J., dissenting).

The court of appeals' framework cannot be reconciled with the few prior decisions the court invoked. Although this Court recognized a *Bivens* action to redress an equal-protection violation involving discrimination in congressional-staff employment, see *Davis* v. *Passman*, 442 U.S. 228 (1979), it later "declined to extend *Davis* to other employment discrimination" arising in the military context, see Pet. App. 24a n.15 (citing *Chappell*, 462 U.S. at 300-304). The court of appeals attributed that difference to "the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury." *Ibid.* But the clear import of this pair of decisions is that, in deciding whether a particular *Bivens* claim arises in a familiar "context," the relevant context must be defined with specificity. Employment discrimination in the military involves a different context than does employment discrimination involving federal civilians. In light of *Davis* and *Chappell*, simply identifying the mechanism of injury as "punitive conditions without sufficient cause" (Pet. App. 25a) does not suffice to establish that the claims here arise in a "familiar context."

3. The principal error in the court of appeals' analysis of the context of respondents' *Bivens* claims, however, is the court's failure to account for "the interrelated conditions in which" the claims "exist[] or occur[]" —that is, for the "context" in which they arise. *Webster's Third New International Dictionary* 492 (1971); see *Black's Law Dictionary* 386 (10th ed. 2014) (defining "context" as "[s]etting or environment"). Here, the conditions in which respondents' *Bivens* claims arise are not the same as those in, for instance, *Carlson* v. *Green*, 446 U.S. 14 (1980), which involved an Eighth Amendment claim by a federal prisoner for deliberate indifference to his medical needs. Respondents were not garden-variety prisoners (or even ordinary pretrial detainees); their claims arise in an atypical context; and petitioners Ashcroft and Mueller in their policymaking capacity are not typical *Bivens* defendants.

As the dissenting judges below explained, multiple aspects of this case make its context a novel one for *Bivens* purposes. Pet. App. 93a-101a (Raggi, J.), 244a-245a (joint dissent). Respondents seek to challenge (1) high-level policy decisions and to do so in a context that implicates both (2) national security and (3) immigration. Other courts in considering whether to extend the *Bivens* remedy have appropriately identified each of those considerations as potentially presenting a novel context.[7] And respondents have identi-

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[7] See, *e.g.*, *Meshal* v. *Higgenbotham*, 804 F.3d 417, 423-425 (D.C. Cir. 2015) (national security), petition for cert. pending, No. 15-1461 (filed June 6, 2016); *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012) (en banc) (policy decisions), cert. denied, 133 S. Ct. 2796 (2013); *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2012) (immigration), cert. denied, 133 S. Ct. 2336 (2013); *Lebron* v.

fied no other decision finding that remotely similar circumstances presented such a familiar *Bivens* context that the special-factors analysis could be disregarded altogether.

B. The *Bivens* Remedy Should Not Be Extended To The Novel Context Of This Case

In this case, the three special factors described above—high-level policy decisions, national security, and immigration—are "inextricably intertwined," Pet. App. 102a (Raggi, J., dissenting), and they counsel decisively against extending the *Bivens* remedy to the present context.

1. The heart of respondents' complaint expressly challenges fundamental "policy" decisions made by the Attorney General in the course of the September 11 investigation: an alleged "policy of rounding up and detaining Arab and South Asian Muslims to question about terrorism," and "a blanket 'hold-until-cleared' policy" under which out-of-status aliens identified as being of interest to the investigation would not be released until the FBI had "affirmatively cleared them of terrorist ties." Pet. App. 252a-253a, 265a (Compl. ¶¶ 2, 39). The court of appeals' lists-merger theory of liability is similarly directed toward an alleged policy decision to continue detaining aliens arrested in conjunction with the September 11 investigation "as if there were some suspicion that those individuals were tied to terrorism, even though no such suspicion existed." *Id.* at 19a.

Rumsfeld, 670 F.3d 540, 552-556 (4th Cir.) (national security), cert. denied, 132 S. Ct. 2751 (2012); *Ali* v. *Rumsfeld*, 649 F.3d 762, 773-774 (D.C. Cir. 2011) (same); *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (policy decisions), cert. denied, 560 U.S. 978 (2010).

To be sure, the Attorney General and FBI Director are individual federal employees who are bound to follow the Constitution. But this Court has "never considered" the *Bivens* remedy to be "a proper vehicle for altering an entity's policy." *Correctional Servs. Corp.*, 534 U.S. at 74. *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers," not "deterring the conduct of a policymaking entity." *Id.* at 71; see *ibid.* ("*Bivens* from its inception has been based * * * on the deterrence of individual officers who commit unconstitutional acts."); *Meyer*, 510 U.S. at 484-486.

High-level policy decisions differ from the unauthorized actions of rogue officers in a way that bears directly on special-factors analysis. Such policies are more likely to be amenable to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and they are more likely to receive scrutiny from entities like Congress or an Inspector General—as, indeed, happened here. See *OIG Report* 37-71, 111-164 (J.A. 96-154, 218-302) (addressing the hold-until-cleared policy and the conditions of confinement at the MDC). In rejecting another *Bivens* claim against former Attorney General Ashcroft, the Second Circuit distinguished between "isolated actions of individual federal employees" and "policies promulgated and pursued by the executive branch." *Arar* v. *Ashcroft*, 585 F.3d 559, 578 (2009) (en banc), cert. denied, 560 U.S. 978 (2010). It noted that an extension of *Bivens* to high-level policies would be "without precedent" and would "implicate[] questions of separation of powers as well as sovereign immunity." *Ibid.* The Seventh Circuit similarly rejected a claim against the former Secretary of Defense, explaining that "the normal means to handle

defective policies * * * is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author." *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013).

Respondents contend (Br. in Opp. 23-24) that excluding high-level policy decisions from the scope of *Bivens* "would effectively grant high-ranking officials absolute immunity—the opposite of what this Court decided in *Mitchell* [v. *Forsyth*, 472 U.S. 511 (1985)]." In *Mitchell*, the Court held that the Attorney General could not assert absolute immunity for a constitutional claim arising from his decision to approve a warrantless wiretap to gather intelligence for national-security purposes. *Id.* at 520-524. *Mitchell* is inapposite here.

The decision of the Attorney General at issue in *Mitchell* was not a policy decision about how to deal with a category of cases. Instead, it was a decision, exercising the President's national-security authority, to authorize a specific wiretap. 472 U.S. at 514. Even assuming *arguendo* that the Attorney General or the FBI Director could be subject to *Bivens* liability for that sort of particularized decision, *Bivens* should not be extended to claims alleging the formulation of unconstitutional *policies*.

In addition, the Court has already rejected an attempt to conflate immunity analysis with the *Bivens* special-factors inquiry. In *Stanley*, the Court held that special factors precluded it from inferring a *Bivens* remedy for claims that unknown Army officers had violated the plaintiff's constitutional rights by secretly subjecting him to testing about the effects of LSD. 483 U.S. at 671-672, 678-686. Foreshadowing respondents' argument in this case, Justice Brennan's dissent-

ing opinion objected that the "practical result" of the Court's decision in *Stanley* was "absolute immunity from liability for money damages for all federal officials who intentionally violate the constitutional rights of those serving in the military." *Id.* at 691. The Court rejected that analogy, explaining that the special-factors inquiry "is analytically distinct from the question of official immunity from *Bivens* liability," and that there is no "reason for creating such an equivalency" between those two questions. *Id.* at 684-685 (emphasis omitted). The Court observed that "the 'special factors' limitation upon the inference of *Bivens* actions" would be "quite hollow" if it merely "duplicate[d] pre-existing immunity from suit." *Id.* at 686.

2. Here, the high-level policy decisions that respondents challenge arise at the confluence of two particular subject areas—national security and immigration—that have traditionally warranted caution about judicial intervention.

a. "[U]nless Congress specifically has provided otherwise," courts are "reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). That hesitancy reflects judicial self-awareness of courts' limited capacity to evaluate national-security judgments. It also reflects judicial recognition that, because claims involving national security are more likely to implicate classified or otherwise-restricted information, the risk of "inadvertent disclosure may jeopardize future acquisition and maintenance of the sources and methods of collect-

ing intelligence." *Lebron* v. *Rumsfeld*, 670 F.3d 540, 554 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012). In such contexts, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" and to "tailor any remedy to the problem perceived." *Wilkie*, 551 U.S. at 562 (citation omitted). "[W]hen Congress deems it necessary for the courts to become involved in sensitive matters, * * * it enacts careful statutory guidelines to ensure that litigation does not come at the expense of national security concerns." *Lebron*, 670 F.3d at 555. For instance, Congress "created the special Foreign Intelligence Surveillance Court to consider wiretap requests in the highly sensitive area of" foreign-intelligence investigations. *Ibid.* And Congress enacted the Classified Information Procedures Act, 18 U.S.C. App. at 860, to regulate the use and disclosure of sensitive information in criminal cases. See generally *United States* v. *Yunis*, 867 F.2d 617 (D.C. Cir. 1989).

In this case, respondents seek to persuade a court that, in the absence of some unspecified quantum of "individualized suspicion," the imposition of restrictive conditions on respondents during their otherwise-valid confinement was so "arbitrary or purposeless" that it could be understood only as the product of punitive or invidious intent. Pet. App. 46a & n.31 (citing *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979)). But whether it was irrational to subject certain detainees arrested during the September 11 investigation to restrictive conditions cannot be assessed without reference to a broad range of national-security considerations, including "the 9/11 attacks, the al Qaeda terrorist organization that ordered them, the attacks' alien perpetrators, and how those aliens—and, therefore, similarly minded

others—could operate in the United States without detection." *Id.* at 109a (Raggi, J., dissenting). A court evaluating that assertion would also need to consider "the history of al Qaeda attacks on American interests *prior* to 9/11," "terrorists' frequent use of immigration fraud to conceal their murderous plans," and events that occurred after September 11 but during the time of the challenged confinement that stoked fears about potential follow-up attacks. *Id.* at 110a. Thus, a court could not find that the conditions in the ADMAX SHU bore so little relation to the Nation's security as to be "arbitrary or purposeless" without second-guessing high-level executive policies in sensitive areas.[8]

Respondents assert (Br. in Opp. 19-20) that their claims do not implicate national-security considerations because their complaint alleges that petitioners "knew there was no reason to suspect [respondents] of any connection to terrorism." But at the time petitioners allegedly ratified the lists-merger decision, they did not know that about respondents. To the contrary, what petitioners allegedly knew was that respondents had already been arrested in connection with the September 11 investigation and that the arresting agents had determined that they should be detained at the

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[8] Such second-guessing would be particularly inappropriate in light of the nature of the lists-merger decision. To the extent that petitioner Ashcroft allegedly "endorsed the restrictive detention" of respondents (Pet. App. 239a (Pooler and Wesley, JJ., concurring in the denial of rehearing)), his decision would have constituted an exercise of discretion about whether to rescind a decision already made by lower-level officials. Such a challenge implicates additional concerns about potential interference with policymakers' ability to prioritize how best to deploy scarce law-enforcement resources—including their own personal attention and energy—during operations like the massive September 11 investigation.

MDC, rather than at another facility such as the Passaic County Jail. See pp. 4-5, *supra*. The decision to continue confining respondents in restrictive conditions under the hold-until-cleared policy was rooted in a desire "to err on the side of caution so that a terrorist would not be released by mistake" while the Executive worked to determine whether aliens such as respondents should continue to be deemed "of interest" to the investigation. *OIG Report* 56 (J.A. 128). The need to conduct a further investigation to clear respondents of any terrorist connections shows that their detention implicated the kinds of national-security considerations that counsel judicial hesitation.

b. Similar prudential principles animate courts' hesitation to infer *Bivens* remedies for claims intimately related to immigration. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Such policies are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" unless Congress has authorized judicial scrutiny. *Id.* at 589. And the fact that "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration," *Mirmehdi* v. *United States*, 689 F.3d 975, 982 (9th Cir. 2012) (quoting *Arar*, 585 F.3d at 572), cert. denied, 133 S. Ct. 2336 (2013), further counsels against judicial inference of additional extra-statutory remedies.

Respondents assert (Br. in Opp. 18) that their challenge has nothing to do with immigration proceedings

or immigration law. But the conditions-of-confinement policies that respondents challenge applied only to aliens who, in addition to being arrested during the September 11 investigation, were being detained for apparent violations of U.S. immigration laws. The principles undergirding courts' reluctance to infer *Bivens* remedies in other immigration-related cases apply with full force here.

3. Finally, respondents seek to minimize the importance of the three considerations discussed above by arguing that, in isolation, none of them would suffice to preclude a *Bivens* remedy. See Br. in Opp. 18-24. Even assuming that were generally true, respondents' divide-and-conquer approach would still miss the point here. Those considerations *taken together* make up the relevant *Bivens* "context" and constitute special factors that should preclude the extension, without congressional authorization, of a damages remedy.

II. Petitioners Are Entitled To Qualified Immunity Because It Was Not Clearly Established, At The Time Of Petitioners' Allegedly Wrongful Conduct, That Aliens Legitimately Arrested During The September 11 Investigation Could Not Be Subjected To Restrictive Conditions Of Confinement Until They Were Cleared Of Any Connections With Terrorism

Even assuming *arguendo* that respondents have plausibly alleged that petitioner Ashcroft or Mueller personally condoned or endorsed a decision to merge two lists of September 11 detainees (but see pp. 40-49, *infra*), petitioners would still be entitled to qualified immunity because, at the time of their allegedly unconstitutional actions, it was not clearly established that continued confinement in restrictive conditions under the hold-until-cleared policy in the wake of the

September 11 attacks was unjustified and therefore necessarily attributable to punitive or discriminatory intentions. In concluding otherwise, the court of appeals defined the relevant legal questions at too high a level of generality, committing a mistake that this Court has often had to correct to ensure that qualified immunity continues to serve its vital purpose of protecting "all but the plainly incompetent or those who knowingly violate the law." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted).

1. Qualified immunity "shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix*, 136 S. Ct. at 308 (citations and internal quotation marks omitted). For three decades, this Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Ibid.* (quoting *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011)); see, *e.g.*, *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 n.5 (2012); *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); *Anderson* v. *Creighton*, 483 U.S. 635, 639-640 (1987). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

With respect to all three claims at issue here (*i.e.*, the substantive-due-process claim, the equal-protection claim, and the statutory claim alleging a conspiracy to deprive persons of equal-protection rights), the court of appeals flouted that long-standing instruction.

2. With respect to respondents' substantive-due-process claim, the court of appeals did not doubt that respondents were lawfully arrested, that respondents could be lawfully detained, or that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on those for whom the government had "individualized suspicion of terrorism." Pet. App. 31a. The court correctly rejected respondents' allegation that the hold-until-cleared policy was punitive from the outset, given the "obvious" and "more likely explanation[]" for that policy identified by this Court in *Iqbal*: a "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." 556 U.S. at 681-682; see Pet. App. 122a-123a (Raggi, J., dissenting). The court nevertheless held that petitioners Ashcroft and Mueller lacked qualified immunity from damages liability for applying the hold-until-cleared policy to individuals on the New York List. That holding was misconceived.

a. Under the court of appeals' lists-merger theory, detainees on the New York List were deemed the equivalent of "ordinary civil detainees" because it was eventually discovered that some individuals on that list had been arrested and detained in connection with the September 11 investigation but without any separate determination that there was evidence linking them to terrorism. Pet. App. 39a, 43a. Thus, when the court addressed qualified immunity, it held simply that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees," and that "a pretrial detainee's

right to be free from punishment does not vary with the surrounding circumstances." *Id.* at 48a, 49a.

Those general formulations failed to account for the actual circumstances that confronted petitioners Ashcroft and Mueller when they allegedly condoned the merger of the two lists of detainees. The relevant question is not whether "ordinary civil detainees" or "pretrial detainee[s]" (Pet. App. 43a, 49a) could have been held in the restrictive conditions at the ADMAX SHU. Respondents were not ordinary civil or pretrial detainees. They had already been arrested pursuant to the September 11 investigation, placed in the MDC, and subjected to the hold-until-cleared policy before it was discovered that, for an unknown portion of the members of the New York List, arresting officers had failed to conduct the same initial vetting that detainees on the national INS list had received.

The court of appeals recognized that respondents' violation of U.S. immigration law justified their confinement (albeit in less restrictive conditions). Pet. App. 47a, 75a. But neither the court of appeals nor respondents have identified any decision indicating, much less clearly establishing as of late 2001, that continuing to apply the hold-until-cleared policy to aliens on the New York List was so "arbitrary or purposeless to national security" as to be unconstitutional. *Id.* at 141a (Raggi, J., dissenting). To the contrary, petitioners could reasonably have thought that their actions—justified as they were by "obvious and legitimate interest[s]," *id.* at 140a—were lawful. In the two years before the September 11 attacks, other detainees charged with or convicted of terrorism-related offenses had incited acts of violence outside prisons and had carried out violent attacks inside prisons. *Id.*

at 143a (citing *United States* v. *Stewart*, 590 F.3d 93, 163-165 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part), cert. denied, 559 U.S. 1031 (2010), and *United States* v. *Salim*, 690 F.3d 115, 119-120 (2d Cir. 2012), cert. denied, 133 S. Ct. 901 (2013)). Placing the September 11 detainees in restrictive conditions limited the risk that they would "communicate in ways that either furthered terrorist plans or thwarted government investigations." *Id.* at 143a. It also limited the risk that, while an individual clearance investigation was pending, an "as-yet-unidentified terrorist associate would threaten either national or prison security." *Ibid.*

b. The court of appeals cited just two precedents in support of its qualified-immunity analysis of respondents' substantive-due-process claim. Neither decision spoke with the requisite specificity. The court cited *Wolfish*, 441 U.S. at 535-539 & n.20, for the proposition that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 48a. That bare recitation of the elements of a substantive-due-process claim cannot establish, much less *clearly* establish, that the restrictions in this case were so unrelated to national security as to violate respondents' constitutional rights. The court's reliance on *Iqbal* v. *Hasty*, 490 F.3d 143 (2d Cir. 2007), rev'd on other grounds, 556 U.S. 662 (2009), was even more misplaced. That decision, which was issued nearly six years after the lists-merger decision (and which was later reversed by this Court on other grounds), relied on *Wolfish* in holding that qualified immunity did not

protect these very petitioners from an identical substantive-due-process claim. See 490 F.3d at 168-169.

c. Even if respondents were indistinguishable from other pretrial detainees, the conditions of their confinement did not violate any constitutional norm that was clearly established at the requisite level of specificity when petitioners acted in late 2001. A considerable body of law pre-dating the lists-merger decision indicated that individualized suspicion was not categorically required to impose restrictive conditions of confinement on lawfully arrested detainees when those conditions reasonably related to a legitimate government objective. In *Block* v. *Rutherford*, 468 U.S. 576 (1984), the Court rejected a constitutional challenge to a policy barring contact visits for all pretrial detainees at the Los Angeles County Central Jail, recognizing that "identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task." *Id.* at 587. In *Wolfish*, the Court rejected a constitutional challenge to a policy mandating post-contact-visit body-cavity searches for all detainees at the Metropolitan Correctional Center in New York, even though such searches had only once uncovered concealed contraband. 441 U.S. at 558. And in *Whitley* v. *Albers*, 475 U.S. 312 (1986), the Court rejected a constitutional challenge to a policy authorizing prison guards to use potentially lethal force against prisoners to quell prison riots involving hostages. *Id.* at 316. More than a decade after the events at issue in this case, this Court rejected a constitutional challenge to a policy that mandated visual strip searches of all arrestees being admitted to certain New Jersey county jails. See *Florence* v. *Board of Chosen Freeholders of the County of Burling-*

ton, 132 S. Ct. 1510, 1523 (2012). Such decisions demonstrate that a restrictive jail or prison policy may under some circumstances be reasonably related to the legitimate governmental objective of maintaining security even when it is applied categorically, without individualized suspicion.

d. The court of appeals' decision is contrary to this Court's repeated admonitions that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743; see *ibid.* (explaining that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law") (citation omitted). As Judge Raggi observed, it is impossible to "conclude that defendants here were plainly incompetent or defiant of established law in instituting or maintaining the challenged restrictive confinement policy." Pet. App. 120a. The six-judge dissent in the court of appeals bolsters petitioners' entitlement to qualified immunity,[9] as does the Inspec-

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[9] See *al-Kidd*, 563 U.S. at 743 (citing eight-judge dissent from denial of rehearing in finding that former Attorney General Ashcroft "deserve[d] qualified immunity" for an alleged policy about detention of terrorism suspects); *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). The qualified-immunity analysis of the six dissenting judges below was ultimately based on the absence of any clearly established right in the context of this case, rather than on a square conclusion that, if the pleadings had otherwise been adequate, there would still have been no constitutional violation. Pet. App. 246a-247a. But one side of the lower-court disagreement mentioned in *Wilson* was also based on decisions finding only that a right was not clearly established. See 526 U.S. at 618 (citing, *inter alia*, *Wilson* v. *Layne*, 141 F.3d 111, 118-119 (4th Cir. 1998), aff'd, 526 U.S. 603 (1999), and *Parker* v. *Boyer*, 93 F.3d 445 (8th

tor General's conclusion, with the benefit of hindsight, that the decision to merge the lists was "supportable, given the desire not to release any alien who might be connected to the attacks or terrorism." *OIG Report* 71 (J.A. 153).

3. For similar reasons, petitioners are also entitled to qualified immunity on respondents' equal-protection claim. As with the substantive-due-process claim, the court of appeals' inference of unconstitutional purpose turned on the court's view that "there was no legitimate reason to [continue to] detain [respondents] in the challenged conditions" when "the DOJ Defendants knew that the government lacked information tying [respondents] to terrorist activity, but decided to merge the lists anyway." Pet. App. 65a-66a. But neither the court nor respondents have cited any decisions holding that continuing restrictive conditions of confinement to address legitimate national-security concerns was so unreasonable as to give rise to an inference of discriminatory intent under the equal-protection component of the Due Process Clause.

The court of appeals cited only its prior decision in *Iqbal* v. *Hasty* for the proposition that government officials may not "hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. 74a. As with its substantive-due-process counterpart, however, that gen-

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Cir. 1996), cert. denied, 519 U.S. 1148 (1997)). Moreover, the dissenters below strongly implied that they may have disagreed with the panel majority about the underlying merits as well, since the dissenters noted "considerable precedent * * * suggest[ing] that restrictive confinement of lawfully detained persons can be based on general, rather than individualized, suspicion of dangerousness." Pet. App. 247a.

eral statement does not come close to establishing, much less clearly establishing, that the restrictions in this case were so clearly unrelated to national security as to compel the inference that they must have been motivated by discriminatory intent. The same is true for the array of equal-protection decisions identified by respondents in their effort to flesh out the court's conclusory analysis. See Br. in Opp. 31-32 (citing, *inter alia*, *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954)). None of those cases involved circumstances remotely similar to the actual "situation [petitioners] confronted." *Saucier*, 533 U.S. at 202.

Thus, as of late 2001, "no clearly established law would have alerted every reasonable officer that it violated equal protection so to confine these lawfully arrested illegal aliens pending clearance." Pet. App. 157a-158a (Raggi, J., dissenting).

4. Respondents also allege that the DOJ and MDC Defendants conspired to deprive respondents of equal protection of the laws, in violation of 42 U.S.C. 1985(3). Pet. App. 347a (Compl. ¶¶ 303-306). The court of appeals' rejection of qualified immunity on that claim was doubly flawed. First, the absence of any clear deprivation of respondents' equal-protection rights (as discussed above) is a sufficient ground for concluding that petitioners did not violate any obligation clearly established by Section 1985(3). See *id.* at 158a n.46 (Raggi, J., dissenting). Second, because it was unclear in 2001 whether Section 1985(3) even applied to federal officials, petitioners' conduct could not have violated any clearly established obligation under that *statute*, regardless of the clarity with which the relevant *constitutional* rules had been defined.

In holding that uncertainty about Section 1985(3)'s applicability to federal officials did not entitle petitioners to qualified immunity, the court of appeals simply followed its prior decision in *Iqbal* v. *Hasty*, *supra*. Pet. App. 83a-84a. There, the court acknowledged that, at least within the Second Circuit, "it was not clearly established in 2001 that section 1985(3) applied to federal officials." 490 F.3d at 176. The court nevertheless concluded that, as long as an equal-protection right had been established by *some* provision of law at the time the defendant acted, it did not matter for qualified-immunity purposes whether the "*source*" of that right was the Constitution or the statute. *Id.* at 177 (citation omitted).

That rationale cannot be squared with this Court's decisions, which have consistently recognized that qualified immunity applies unless the defendant's actions clearly violated the *specific* right that provides the basis for the plaintiff's claim. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[O]fficials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation."). Qualified immunity therefore is not "defeated where a defendant violates *any* clearly established duty." *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994). Instead, the "clearly established right" must "be the federal right on which the claim for relief is based." *Ibid.*; see *Reichle*, 132 S. Ct. at 2093 ("To be clearly established" for qualified-immunity purposes, "a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates *that right*.") (emphasis added; brackets, citations, and internal quotation marks omitted).

* * * * *

The six dissenters below correctly concluded that the court of appeals had erred by denying "qualified immunity in the unprecedented circumstances of this case." Pet. App. 247a. As it has repeatedly done in recent cases where the unlawfulness of particular actions had not been clearly established at the time of the underlying conduct,[10] this Court should correct the court of appeals' misapplication of qualified-immunity principles and confirm—more than 14 years after this case began—that the former Attorney General and FBI Director cannot be compelled to defend against the claims for money damages set forth in respondents' complaint.

III. Respondents Have Not Plausibly Alleged That Petitioners Personally Condoned The Implementation Of Facially Constitutional Policies In A Discriminatory Or Unreasonably Harsh Manner

Finally, the court of appeals did not faithfully apply the pleading standard required by *Ashcroft* v. *Iqbal*, *supra*. That error, too, independently warrants reversal.

1. As the court of appeals recognized, *Iqbal* "significant[ly] * * * altered" the legal landscape of this case. Pet. App. 4a. First, the *Iqbal* Court reaffirmed that a complaint must be dismissed unless it "contain[s] sufficient factual matter, accepted as true, to

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[10] See, *e.g.*, *Mullenix*, 136 S. Ct. at 308-312; *Taylor* v. *Barkes*, 135 S. Ct. 2042, 2044-2045 (2015) (per curiam); *City & County of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1775-1778 (2015); *Carroll* v. *Carman*, 135 S. Ct. 348, 350-352 (2014) (per curiam); *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2022-2024 (2014); *Wood* v. *Moss*, 134 S. Ct. 2056, 2066-2070 (2014); *Stanton* v. *Sims*, 134 S. Ct. 3, 5-7 (2013) (per curiam); *Reichle*, 132 S. Ct. at 2093-2097; *al-Kidd*, 563 U.S. at 741-744.

'state a claim to relief that is plausible on its face.'" 556 U.S. at 678 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," and a complaint does not cross that threshold by "plead[ing] facts that are 'merely consistent with' a defendant's liability." *Ibid.* (quoting *Bell Atl. Corp.*, 550 U.S. at 557). Second, the Court in *Iqbal* held that *Bivens* claims cannot go forward based on allegations of supervisory liability. *Id.* at 676. A *Bivens* plaintiff therefore must "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ibid.*; see *id.* at 677 ("[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct.").

The *Iqbal* Court applied those principles in ordering dismissal of allegations functionally identical to the ones respondents make here. The plaintiff in *Iqbal* claimed that he had been detained in the MDC's ADMAX SHU in accordance with a policy of "classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin." 556 U.S. at 682. The Court concluded that, although "other defendants * * * may have labeled [plaintiff] a person 'of high interest' for impermissible reasons," no plausible allegation linked Attorney General Ashcroft or Director Mueller to those actions. *Id.* at 682-683. The Court found the absence of such an allegation decisive, explaining that Ashcroft and Mueller could not be held personally liable under *Bivens* for the unconstitutional conduct of their subordinates. *Id.* at 683.

The Court in *Iqbal* also refused to credit the plaintiff's assertions that the hold-until-cleared policy and

the FBI's arrests were motivated by a discriminatory purpose. The Court deemed those conclusory assertions implausible in light of "more likely explanations." 556 U.S. at 681. The most "'obvious alternative explanation,'" the Court explained, was that the arrests "were likely lawful and justified by [a] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682 (quoting *Bell Atl. Corp.*, 550 U.S. at 567). In this Court's view, the policy of imposing restrictive conditions of confinement on September 11 detainees "plausibly suggest[ed]" only that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683.

2. Like the plaintiff in *Iqbal*, respondents allege that Attorney General Ashcroft intended all along for the September 11 investigation to "target[] innocent Muslims and Arabs," and that Director Mueller "knowingly joined" "the Ashcroft sweeps" and "the hold-until-cleared policy." Pet. App. 265a (Compl. ¶ 41) (capitalization altered). According to respondents, only "invidious animus against Arabs and Muslims" could explain those decisions. *Id.* at 272a (¶ 60). Respondents further allege that Ashcroft and Mueller "authorized [respondents'] prolonged detention in restrictive conditions," *id.* at 276a (¶ 67), and that their decision to authorize such treatment could have been motivated only by an impermissible punitive intent, *id.* at 342a (¶ 278). In *Iqbal*, however, the Court held that such inferences were not sufficiently plausible to survive a motion to dismiss, in light of the obvious alter-

native explanation that the challenged actions "were likely lawful and justified by [a] nondiscriminatory"—and nonpunitive—intention "to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." 556 U.S. at 682.

Perhaps because of *Iqbal*, the court of appeals eschewed respondents' theory of liability. It recognized that Ashcroft's "arrest and detention mandate" was facially legitimate and that "the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner." Pet. App. 31a. The court nevertheless constructed its own theory about how—in light of unanticipated developments in the massive September 11 investigation—Ashcroft and Mueller could be deemed "responsible for a decision to merge" two lists of detainees and therefore to have "condoned" discriminatory (or unreasonably harsh) treatment of some of the September 11 detainees. *Id.* at 32a-33a, 61a.[11] The court's reframing of respondents' allegations, however, also runs afoul of *Iqbal*.

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[11] See Pet. App. 32a n.21 (noting that respondents "did not advance the 'lists-merger theory'" in the court of appeals or district court). Respondents assert that it is "misleading" to characterize the lists-merger theory of liability as different from their own, because their fourth amended complaint mentions the lists-merger decision. Br. in Opp. 28 n.10. According to their complaint, however, the decision to merge lists was merely evidence that Ashcroft had, from the outset, intended that suspicionless arrests and severely restricted confinement would be based solely on ethnic or religious animus. Pet. App. 267a-268a (Compl. ¶ 47). The court of appeals rejected that approach but found it plausible to infer, from Ashcroft's alleged approval of the lists-merger decision, that Ashcroft newly formed a discriminatory intent at the time that approval took place. See *id.* at 32a-33a.

3. The court of appeals explained that, to state a substantive-due-process or equal-protection claim under the lists-merger theory, the complaint must plausibly plead at least four premises: (1) that petitioner Ashcroft personally made or approved the decision to merge the lists of detainees, Pet. App. 32a, 37a-42a, 61a; (2) that Ashcroft did so after learning that the New York List included some persons who had been detained in connection with the September 11 investigation in part because of their ethnicity or religion but without a determination that there was reason to suspect them of links to terrorism, *id.* at 31a-32a, 36a-38a, 61a, 65a-66a; (3) that Ashcroft also knew that at least some of the detainees on the New York List were being detained in the ADMAX SHU, *id.* at 34a-36a & n.25, 62a-63a, 67a; and (4) that Ashcroft further knew that conditions of confinement in the ADMAX SHU were so restrictive that they could not reasonably be imposed on someone for whom the government lacked individualized suspicion of terrorism connections, *id.* at 33a-35a, 45a-47a, 63a-64a.[12] Accepting the plausibility of each of those premises, the court concluded that respondents "ha[d] plausibly alleged that [petitioners] condoned and ratified the New York FBI's discrimina-

[12] The court of appeals did not view respondents' complaint as plausibly alleging that petitioner Mueller had any role in making or approving the lists-merger decision. Instead, it countenanced respondents' vague allegation that Director Mueller and INS Commissioner Ziglar had "complied with" that decision. Pet. App. 43a (quoting Compl. ¶ 47). The court suggested that their compliance had taken the form of "execution of" the decision to "hold[] ordinary civil detainees under the most restrictive conditions of confinement," *ibid.*, though it did not explain how either the FBI or the INS—neither of which was actually holding the detainees—was responsible for executing the purportedly illegal decision.

tion in *identifying* detainees by merging the New York List with the INS List." *Id.* at 67a; see *id.* at 32a-33a (describing a similar chain of reasoning for imputing "punitive intent" to petitioners for the substantive-due-process claim); *id.* at 81a (same, with respect to the Section 1985(3) conspiracy claim).

None of the conclusory allegations undergirding the court of appeals' analysis merits the presumption of truth. To begin with, as Judge Raggi explained in her dissent, nothing but "pure speculation" (Pet. App. 42a) links Attorney General Ashcroft to the actual decision to merge the two lists of detainees. See *id.* at 124a-129a. Respondents allege that Ashcroft himself made the decision. *Id.* at 268a (Compl. ¶ 47). But the Inspector General's report—which was incorporated by reference into respondents' complaint "except where contradicted by the allegations of [the complaint]," *id.* at 253a n.1—explained that the decision was made by someone who worked in the office of the Deputy Attorney General. See *OIG Report* 55-56 (J.A. 126-128). The court of appeals speculated (Pet. App. 129a) that Associate Deputy Attorney General Levey might have consulted with Attorney General Ashcroft *before* attending a November 2, 2001 meeting, which was convened "to continue discussing what to do about the separate New York [L]ist," and which culminated in Levey's "deci[sion] that all the detainees on the New York [L]ist would be added to the INS Custody List." *OIG Report* 55, 56 (J.A. 126, 128). But the mere possibility that such consultation occurred does not render the allegation of Ashcroft's involvement nonconclusory. See *Iqbal*, 556 U.S. at 681 ("[W]e do not reject these bald allegations on the ground that they are unrealistic or nonsensical. * * * It is the[ir] conclusory

nature * * * that disentitles them to the presumption of truth."). Absent any plausible suggestion that petitioners personally made or approved the decision to merge the New York List into the nationwide INS list, respondents cannot state a *Bivens* claim against them. See *id.* at 676.

Nor is it likely (as opposed to merely possible) that the regular arrest reports provided to petitioners indicated that some individuals were being detained without any evidence of a potential connection to terrorism despite an INS field order "discourag[ing] arrest in cases that were 'clearly of no interest in furthering the investigation.'" Pet. App. 17a (majority opinion) (quoting *OIG Report* 45 (J.A. 110)). That is especially so because Ashcroft and Mueller could not have *known* without further investigation that any of the individuals on the New York List were not actually dangerous. The entire premise of the facially legitimate hold-until-cleared policy was that the government did not know whether any particular detainee could be safely released until investigation had cleared him of "potential connections to those who committed terrorist acts." *Iqbal*, 556 U.S. at 682. Although respondents allege that such uncertainty is insufficient to justify application of the hold-until-cleared policy to them, they cannot reasonably dispute that the uncertainty existed.

Even assuming that petitioners made (or learned about) the lists-merger decision, that would not mean that they "intended for [respondents] to be held in the MDC's ADMAX SHU." Pet. App. 130a, 141a-142a (Raggi, J., dissenting). That premise depends on yet another unsupported inference: that petitioners might have been made aware of the conditions of confinement at the MDC. *Id.* at 132a-135a. That inference is

particularly implausible in light of the fact that, contrary to respondents' suggestion (Br. in Opp. 28), the lists-merger decision did not require any detainee to be *transferred to* "an especially restrictive form of confinement." The decision merely preserved the pre-merger status quo, in which the majority of detainees from the New York List remained in far-less-restrictive conditions at the Passaic County Jail; only those detainees who had already been confined in the ADMAX SHU were required to remain there. See Pet. App. 130a, 152a-153a (Raggi, J., dissenting). That status quo, as even the court of appeals recognized, did not reflect an unconstitutional pre-lists-merger intention on the part of petitioners. *Id.* at 31a, 47a, 63a.[13]

4. Most importantly, even if petitioners could plausibly be thought to have known about both the over-inclusiveness of the New York List and the conditions of confinement at the MDC, an inference of discriminatory intent on petitioners' part would still be unwarranted. The court of appeals found it "reasonable to infer that Ashcroft, Mueller, and Ziglar possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner, and nevertheless condoned that discrimination by ordering and complying with the merger of the lists." Pet. App. 64a.

That inference, however, disregards the distinction that the *Iqbal* Court drew in the context of a *Bivens* claim between taking an action "*because of*" its "adverse effects upon an identifiable group" and doing so

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[13] The *OIG Report* mentions one instance in which an "allegation of [detainee] mistreatment" was "called to the attention of the Attorney General." *OIG Report* 20 (J.A. 73). Far from condoning mistreatment, Ashcroft reportedly called for a staff inquiry. *Ibid.*

"*in spite of*" such effects. 556 U.S. at 677 (emphases added; citation omitted). "[P]urposeful discrimination requires more than * * * 'intent as awareness of consequences.'" *Id.* at 676 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979)). And because a supervisor is liable only for his "own misconduct," the supervisor's "mere knowledge of his subordinate's discriminatory purpose" does not "amount[] to the supervisor's violating the Constitution." *Id.* at 677.

The court below conflated those concepts in holding that Ashcroft's discriminatory intent could be inferred from allegations that he had *known* about "the New York FBI field office's discriminatory formulation of [its detainee] list" (Pet. App. 64a) and had nevertheless decided that detainees on the New York List would remain subject to the hold-until-cleared policy even if they were confined at the MDC. That inference of discriminatory intent on Ashcroft's part is belied by the obvious alternative explanation for the lists-merger decision: a "concern that absent further investigation, 'the FBI could unwittingly permit a dangerous individual'" to be released. *Id.* at 19a (quoting *OIG Report* 53 (J.A. 123)). Thus, as with the initial adoption of the hold-until-cleared policy, see *Iqbal*, 556 U.S. at 683, the far simpler and more natural inference is that the decision to merge the lists was made *in spite of* concerns about how the New York List had been constructed, not because of them.

Shorn of respondents' conclusory allegations, the court of appeals' lists-merger theory is simply an end-run around the limits on supervisory liability and a rejection of the inference that the Court in *Iqbal* drew about petitioners' likely motivations for applying the

hold-until-cleared policy. Allowing this damages suit against the former Attorney General and FBI Director to proceed on such terms comes at a substantial cost—one that courts should be especially reluctant to impose in the context of the unprecedented investigation into the September 11 attacks. In such situations, national officeholders should not be "deterred from full use of their legal authority" (*al-Kidd*, 563 U.S. at 747 (Kennedy, J., concurring)) by the prospect of prolonged litigation. The Court should hold that respondents' allegations are insufficient to allow this suit to proceed past the pleading stage.

CONCLUSION

The judgment of the court of appeals against petitioners Ashcroft and Mueller should be reversed.

Respectfully submitted.

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